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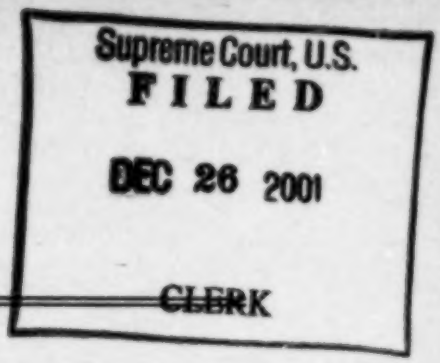

In The

Supreme Court of the United States

CHEVRON U.S.A., INC.,

Petitioner,

v.

MARIO ECHAZABAL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF EMPLOYERS GROUP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER CHEVRON U.S.A., INC. ON THE MERITS

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TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST OF *AMICUS*	1
SUMMARY OF ARGUMENT.....	1
ARGUMENT	3
I. AN INDIVIDUAL CANNOT BE DEEMED QUALIFIED UNDER THE ADA IF HE CANNOT PERFORM THE ESSENTIAL FUNCTIONS OF THE POSITION SAFELY.....	3
II. AN EMPLOYER DOES NOT DISCRIMINATE UNDER THE ADA BY USING QUALIFICATION STANDARDS, INCLUDING SAFETY STANDARDS, THAT ARE JOB-RELATED AND CONSISTENT WITH BUSINESS NECESSITY...	8
III. THE NINTH CIRCUIT CONSTRUES THE EMPLOYERS' DEFENSES TO CHARGES OF DISCRIMINATION UNDER THE ADA TOO NARROWLY	11
IV. AN EMPLOYMENT DECISION BASED ON AN INDIVIDUALIZED ASSESSMENT OF THE DISABLED INDIVIDUAL'S ABILITY TO PERFORM THE POSITION WITH OR WITHOUT A REASONABLE ACCOMMODATION IS PERMISSIBLE, NOT PATERNALISTIC	17
CONCLUSION	23

TABLE OF AUTHORITIES

Page

CASES:

Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999) ... 10, 11

Chiari v. City of League City, 920 F.2d 311 (5th Cir. 1991) ... 5, 21

Davis v. Meese, 692 F. Supp. 505 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3d Cir. 1989) ... 5

Dothard v. Rawlinson, 433 U.S. 321 (1977) ... 20, 21, 22

EEOC v. Exxon Corp., 203 F.3d 871 (5th Cir. 2000) ... 16

Huber v. Howard County, 849 F. Supp. 407 (D. Md. 1994), *aff'd*, 56 F.3d 61 (4th Cir. 1995) ... 5

International Union v. Johnson Controls, Inc., 499 U.S. 187 (1991) ... 20

Jackson v. Boise Cascade Corp., 941 F. Supp. 1122 (S.D. Ala. 1996) ... 5

LaChance v. Duffy's Draft House, Inc., 146 F.3d 832 (11th Cir. 1998) ... 5

Moses v. American Nonwovens, Inc., 97 F.3d 446 (11th Cir. 1996) ... 5

STATUTES:

The Americans with Disabilities Act:

42 U.S.C. § 12101 ... 22

42 U.S.C. § 12111(3) ... 15

42 U.S.C. § 12111(8) ... 4,, 6, 7

42 U.S.C. § 12112(a) ... 4

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 12112(b) ... 8

42 U.S.C. § 12112(b)(6) ... 7, 8, 16

42 U.S.C. § 12112(d)(3) ... 18

42 U.S.C. § 12113 ... 16

42 U.S.C. § 12113(a) ... 7, 8, 11, 16

42 U.S.C. § 12113(b) ... 12, 15, 16

42 U.S.C. § 12117(b) ... 15

42 U.S.C. § 12201 ... 15

The Occupational Safety and Health Act:

29 U.S.C. § 654(a) ... 9, 11

California Labor Code § 6402 ... 9, 11

REGULATIONS:

The Americans with Disabilities Act Regulations:

29 C.F.R. § 1630.2(m) ... 4

29 C.F.R. § 1630.2(n)(3) ... 6, 7

29 C.F.R. § 1630.2(q) ... 9

29 C.F.R. § 1630.2(r) ... 14, 18

29 C.F.R. § 1630.7 ... 8

29 C.F.R. § 1630.10 ... 8

29 C.F.R. § 1630.14(b) ... 18

29 C.F.R. § 1630.15 ... 16

TABLE OF AUTHORITIES – Continued

Page

29 C.F.R. § 1630.15(b) 8, 11

29 C.F.R. § 1630.15(b)(2) 14

29 C.F.R. § 1630.15(e) 7, 10

MISCELLANEOUS:

H.R. Conf. Rep. No. 101-596 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565 ..... 7, 9, 15

Statement by President Bush, 26 Weekly Comp. Pres. Doc. 1165 (1990), *reprinted in* 1990 U.S.C.C.A.N. 601 15

H.R. Rep. 101-485(II) (1990), *reprinted in* 1990 U.S.C.C.A.N. 303 ..... 9, 13, 17, 18, 19, 20

H.R. Rep. 101-485(III) (1990), *reprinted in* 1990 U.S.C.C.A.N. 445 ..... 7, 9

STATEMENT OF INTEREST OF *AMICUS*[1]

Amicus Curiae Employers Group, formerly known as the Merchants Manufacturers Association and Federated Employers, is headquartered in California, and is one of the nation's oldest and largest human resources management associations. It represents nearly 5,000 companies of all sizes and in every industry, employing in the aggregate approximately 2.5 million employees. Because of its collective experience in employment matters, including its appearance as *amicus curiae* in state and federal forums over many decades, Employers Group is uniquely able to assess both the impact and implications of the legal issues presented in employment cases like this one.

SUMMARY OF ARGUMENT

The Ninth Circuit's opinion in *Echazabal v. Chevron U.S.A., Inc.* (App. 1a-24a), authored by Judge Reinhardt, places employers in an untenable position. After *Echazabal*, an employer must now choose between risking liability for disability discrimination or causing serious harm or even death to an applicant. The *Echazabal* opinion squarely holds that employers in the Ninth Circuit must hire a disabled applicant even though performing the essential functions of the position creates a risk of grave harm to that individual. According to the Ninth

[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Circuit, the disabled individual, not the employer, decides whether to accept such risks. "Under the ADA," Judge Reinhardt stated, "an employer may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health." *Id.* at 8a.

This conclusion, however, ignores two critical parts of the ADA analysis: (1) whether the disabled individual is "qualified" to perform the essential functions of the position and (2) whether safety, medical and other physical criteria that may screen out a disabled individual are nevertheless permissible because they are job-related and consistent with business necessity.

To be qualified, a disabled individual must be able to perform the job safely and without great risk to his or her health. Holding otherwise, as the Ninth Circuit did, carries anti-paternalism to the extreme. Employers would be forced to offer disabled applicants positions that could knowingly expose them to serious risk of harm, even if doing so would violate not only other federal and state safety laws but also common notions of good sense and decency. Surely, the ADA was not intended to lead to such a result.

The Ninth Circuit's decision in *Echazabal* is not only wrong as a matter of statutory interpretation but, as Judge Reinhardt himself recognized, it also creates a clear split among the Circuit Courts regarding whether an employer may use medical and safety standards that are job-related and consistent with business necessity to determine if a disabled applicant is qualified for a job without risking liability for disability discrimination.

App. 5a-6a n.4; *see also* Chevron U.S.A., Inc.'s Writ Petition at 12-21. While a nationwide employer such as Chevron U.S.A, Inc. may adopt and use such safety standards in most states, the *Echazabal* decision essentially precludes the employer's ability to use those very same standards at business locations within the Ninth Circuit. Neither disabled individuals nor employers should be placed at greater risk merely because of their physical location. Indeed, both groups would be better served by a uniform and consistent interpretation of these essential provisions of the ADA, an interpretation that only this Court can render.

ARGUMENT

I. AN INDIVIDUAL CANNOT BE DEEMED QUALIFIED UNDER THE ADA IF HE CANNOT PERFORM THE ESSENTIAL FUNCTIONS OF THE POSITION SAFELY.

From a statutory standpoint, Judge Reinhardt's opinion starts from the wrong premise. It analyzes the availability of the so-called "direct threat" defense without first establishing that the employer had discriminated against the employee in violation of the ADA. App. 4a-13a. Because the particular ADA provision reviewed by the Ninth Circuit does not specifically mention whether the safety of the applicant can be considered, the Court leaps to the conclusion that it may never be.

Almost as an after-thought, the Ninth Circuit considered the most fundamental question facing an employer under the ADA – whether the applicant is a qualified

individual with a disability. App. 14a-18a. Had the Ninth Circuit started its analysis by asking this threshold question, it would have determined, under the language of the ADA and the EEOC's implementing regulations, that Mr. Echazabal was not a qualified individual with a disability. Upon such a conclusion, it would not have been necessary to address the availability of the "direct threat" defense where the individual poses a threat only to himself and not to others.

To be liable under the ADA, an employer must have committed an act of discrimination. Section 12112(a) of the ADA states the general anti-discrimination rule: "No covered entity shall discriminate against a *qualified individual with a disability* because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (emphasis added). The term "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The EEOC regulations further refine the term "qualified." The disabled individual must also satisfy the requisite skill, experience, education and other job-related requirements of the employment position held or sought. 29 C.F.R. § 1630.2(m).

A disabled individual who cannot perform the essential functions of a position safely cannot be deemed qualified under any interpretation of the ADA. Federal cases throughout the country have concluded that it is not

enough for a disabled individual to be physically able to perform the essential functions of a position, with or without a reasonable accommodation; they must also be able to do so safely to be covered by the Act. *LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832, 835-36 (11th Cir. 1998) (epileptic cook held not to be qualified individual with disability because he could not perform essential elements of the position safely); *Moses v. American Nonwovens, Inc.*, 97 F.3d 446, 447-48 (11th Cir. 1996) (epileptic employee could not safely perform job as product inspector or operator because both required work with fast moving machinery, some of which was heated to 350 degrees); *see also Huber v. Howard County*, 849 F. Supp. 407, 412-13 (D. Md. 1994), *aff'd*, 56 F.3d 61 (4th Cir. 1995) (asthmatic firefighter held not to be qualified individual with disability because of risk of incapacitation at scene of fire by allergens, variable weather conditions, and hazardous and toxic fumes and substances); *Chiari v. City of League City*, 920 F.2d 311, 317 (5th Cir. 1991) (holding under Section 501 of the Rehabilitation Act of 1973 that construction inspector with Parkinson's disease was not qualified because of the risk to his own safety); *Davis v. Meese*, 692 F. Supp. 505, 519 (E.D. Pa. 1988) (holding under Rehabilitation Act, that diabetic was not qualified to be a special agent because certain assignments would be too risky for someone who is dependent on insulin), *aff'd*, 865 F.2d 592 (3d Cir. 1989). These holdings recognize that "a common sense element to any job is the ability to complete a task in a safe manner." *Jackson v. Boise Cascade Corp.*, 941 F. Supp. 1122, 1127 (S.D. Ala. 1996).

The Ninth Circuit's opinion disregards this common sense element. It would compel employers to hire the

blind ironworker, the claustrophobic miner and the asthmatic granary worker merely because those individuals were willing to accept the obvious risks that their employment would entail.

By this holding, the Ninth Circuit has essentially eviscerated the statutory right of the employer under the ADA to determine not only the essential functions of the position but also other job-related safety requirements that are consistent with business necessity. App. 14a-18a. Section 12111(8) of the ADA, which provides the statutory definition of "qualified individual with a disability," states that "consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description *shall* be considered evidence of the essential functions of the job." 42 U.S.C. § 12111(8) (emphasis added); *see also* 29 C.F.R. § 1630.2(n)(3).

Judge Reinhardt, skeptical of Chevron's actions, refused to afford Chevron's job description the deference that the ADA requires. App. 15a. That description included a job-related safety condition required to successfully perform the plant helper position in the coker unit – namely physical tolerance for hydrocarbon liquids and vapors, petroleum, solvents and oils. App. 36a-37a. Although the Ninth Circuit recognized the employer's right to determine which functions are essential (App. 14a), the majority then reached the illogical conclusion that this job-related safety requirement does not (and cannot) become an "essential" function of the job simply because Chevron chose to describe it as such. App. 15a. This finding clearly contradicts congressional intent to

allow the employer – not the applicant or the employee or even the courts – to determine what functions are essential. 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(n)(3).

The ability to perform the essential functions safely is no less important, and indeed may even be more important, to the employer than the disabled individual's ability to perform those same functions competently, with or without a reasonable accommodation. Such safety requirements are so fully integrated with the essential functions that they cannot be separated with the crude analysis employed by the Ninth Circuit. *Id.* This is not, as the Ninth Circuit assumes, an attempt to transform marginal functions into essential ones by adding them to a job description. App. 15a-16a n.9. Rather, it is a legitimate effort by an employer to ensure the safety of its employees as it is required to do under other federal and state laws and which it is permitted to do under the ADA. 42 U.S.C. §§ 12112(b)(6), 12113(a); 29 C.F.R. § 1630.15(e); *see also* H.R. Rep. No. 101-485(III), at 43 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 466, and H.R. Conf. Rep. No. 101-596, at 59 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565, 568. A disabled individual who cannot perform the essential functions of the position sought or held safely, with or without reasonable accommodation, should be no more qualified under the ADA than the individual who cannot perform those same functions competently. The Ninth Circuit, however, would find that the employer discriminated against the former, but not the latter, applicant. The ADA does not support such a distinction.

II. AN EMPLOYER DOES NOT DISCRIMINATE UNDER THE ADA BY USING QUALIFICATION STANDARDS, INCLUDING SAFETY STANDARDS, THAT ARE JOB-RELATED AND CONSISTENT WITH BUSINESS NECESSITY.

By considering whether Chevron could establish a defense under the ADA before first establishing that it had discriminated against Mr. Echazabal, the Ninth Circuit placed the cart before the horse. The anti-discrimination provision of Title I of the ADA specifically defines prohibited acts of discrimination. 42 U.S.C. § 12112(b); 29 C.F.R. §§ 1630.7, 1630.10. Included on that list is the use of qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities *unless* the standard, test or other selection criteria used by the covered entity is shown to be job-related for the position in question and is consistent with business necessity.[2] *Id.* The legislative history makes clear that "an employer may still devise physical and other job

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[2] The application of such a qualification standard is also a defense to a charge of discrimination. 42 U.S.C. § 12113(a); 29 C.F.R. § 1630.15(b). The ADA excludes from the definition of "discrimination" the application of qualification standards, tests or selection criteria that are job-related and consistent with business necessity. 42 U.S.C. § 12112(b)(6); 29 C.F.R. § 1630.10. The employer may also assert, as a defense to a charge of discrimination, that its qualification standards, tests or selection criteria are job-related and consistent with business necessity. 42 U.S.C. § 12113(a); 29 C.F.R. § 1630.15(b). The inclusion of the same standard in the definition of discrimination and as a defense to such a charge raises unique burden of proof issues under the ADA that are most appropriately resolved by this Court.

criteria and tests for a job so long as the criteria or tests are job-related and consistent with business necessity." H.R. Rep. No. 101-485(II), at 56 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 338.

Not surprisingly, the EEOC itself recognizes that a qualification standard can include physical, medical and safety requirements. According to the EEOC regulations, qualification standards include "personal and professional attributes including the skill, experience, education, *physical, medical, safety* and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired." 29 C.F.R. § 1630.2(q) (emphasis added). This definition makes sense.

While the ADA is intended to promote employment opportunities for individuals with disabilities, it is not intended to do so at the risk of their health or safety. Each and every employer must comply with federal and state safety regulations. Not only must employers operate safe and healthful work places, they are also prohibited from engaging in any business practices that endanger the health and welfare of their employees. 29 U.S.C. § 654(a) (OSHA); *see also* Cal. Lab. Code § 6402 ("No employer shall require, or permit any employee to go or be in any employment or place of employment which is not safe and healthful"). The ADA was not intended "[t]o override any legitimate medical standards or requirements established by federal, state or local law. . . . " H.R. Rep. No. 101-485(III), at 43 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 466, and H.R. Conf. Rep. No. 101-596, at 59 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565, 568.

The Ninth Circuit, however, rejected the application of Chevron's occupational safety requirement as a valid qualification standard without even analyzing how that term is defined under the ADA. *Id.* App. 16-17a n.10. Neither the statute nor its regulations nor the legislative history of the ADA support the Court's conclusion that safety-related criteria cannot be a valid qualification standard.

Employers must be allowed to balance their anti-discrimination obligations under the ADA with other legal obligations intended to promote the health and welfare of all employees. The EEOC regulations recognize and provide for such balance. 29 C.F.R. § 1630.15(e). Section 1630.15(e) states: "It may be a defense to a charge of discrimination under this part that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action . . . that would otherwise be required by this part." *Id.*

This sound principle ensures that an employer is not confronted with a charge of discrimination simply because it complied with its legal obligations, a principal that has been reaffirmed by this Court in its recent ADA jurisprudence.[3] *See Albertson's, Inc. v. Kirkingburg*, 527 U.S.

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[3] The Ninth Circuit's opinion dismisses the potential liability confronting an employer should a disabled employee be harmed by the conditions that the employer had believed to be unsafe. App. 12a-13a. The Ninth Circuit states, without any authority, that the employer would be shielded from liability because the ADA would preempt state tort law. *Id.* at 13a. However, the Ninth Circuit completely ignores that the

555, 570 (1999) (recognizing that employer has unconditional obligation to follow safety regulations and a consequent right to do so without committing act of discrimination). Clearly, the employers' duty to comply with such laws and regulations at the federal and state level is likely to "be critical" in their determination of whether an applicant is a "qualified individual with a disability." *Albertson's*, 527 U.S. at 580 (J. Thomas concurring opinion).

III. THE NINTH CIRCUIT CONSTRUES THE EMPLOYERS' DEFENSES TO CHARGES OF DISCRIMINATION UNDER THE ADA TOO NARROWLY.

Even assuming that the employee could establish that he or she is a qualified individual with a disability and that the employer committed a prohibited act, the ADA affords the employer several defenses to a charge of discrimination. Among those defenses is the employer's right to demonstrate that the qualification standards that have allegedly screened out the qualified individual with a disability are job-related and consistent with business necessity. 42 U.S.C. § 12113(a); 29 C.F.R. § 1630.15(b). The ADA does not enumerate permissible "qualification standards" because such standards are unique to both the

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employer could face statutory liability for violating safety regulations by hiring an employee who will be harmed by the conditions of his or her employment simply because of the employee's particular disability. 29 U.S.C. § 654(a) (OSHA); *see also* Cal. Lab. Code § 6402. There is no basis to believe that the ADA would preempt federal and state safety regulations intended to protect all workers. *Id.*

particular job and employer. Section 12113(b), however, does elaborate on one such standard, stating: "The term 'qualification standards' *may include* a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b) (emphasis added).

The Ninth Circuit seized on the wrong word in this provision to justify its holding that employers may not consider the risk to the health or safety of the disabled individual when making employment decisions. App. 6a-7a. The Circuit Court concluded that the "direct threat" defense was only applicable where the individual creates a risk of harm to other individuals, but not where the individual's disability created a risk of harm to himself, given the nature of his disability and the particular requirements of the position he was seeking. *Id.*

The Ninth Circuit's conclusion hinges on the use of the word "shall" in section 12113(b) of the ADA but ironically ignores the words "may include" just before. *Id.* The Ninth Circuit stated:

> On its face, the provision does not include direct threats to the health or safety of the disabled individual himself. Moreover, by specifying only threats to 'other individuals in the workplace,' the statute makes it clear that threats to other persons – including the disabled individual himself – are not included within the scope of the defense.

Id. at 6a. Based on what the Ninth Circuit concluded was an unambiguous expression of congressional intent, the Court rejected the EEOC's broader definition of the term "direct threat," which expanded the application of the

"direct threat defense" to cases where the individual posed a risk of harm to himself. *Id.* This rejection was unsound.

The legislative history indicates that the concept of "direct threat" is broad enough to cover the EEOC's regulations and might even stretch to a threat to property. The House Report for the Education and Labor Committee stated: "It is also acceptable to deny employment to an applicant or to fire an employee with a disability on the basis that the individual poses a direct threat to the health and safety of others or poses a direct threat to property." H.R. Rep. No. 101-485(II), at 56 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 338. What is not acceptable, according to the House Labor and Education Committee, is for an employer to make such a determination based on "generalizations, misperceptions, ignorance, irrational fears, patronizing attitudes, or pernicious mythologies." *Id.* Rather, the employer's decisions must be made on a case-by-case basis. *Id.* It would be ironic, indeed, if the ADA allowed an employer to deny an employment opportunity to protect its property but not to protect the safety of that applicant or employee based on individualized and objective medical recommendations. *See id.* at 57 (making direct threat determination requires a fact-specific individualized inquiry resulting in a "well-informed judgment grounded in a careful and open-minded weighing of risks and alternatives.") (citations omitted).

The EEOC's decision to combine an available defense to a charge of discrimination based on the threat to the health or safety of an individual with a defense based on the "direct threat" to others makes sense from both a

legislative and enforcement perspective. 29 C.F.R. §§ 1630.2(r), 1630.15(b)(2). This combination ensures that employers make an "individualized assessment of the individual's present ability to safely perform the essential functions of the job" before determining that the individual is not a qualified individual with a disability. 29 C.F.R. § 1630.2(r). Such an assessment must be based on "reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence" and must consider the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur and the imminence of the potential harm. *Id.* By combining these two qualification standards, the EEOC ensures that the employer conducts the same level of individualized assessment regardless of whether the risk is to the individual alone or to others.

A broader interpretation of the direct threat defense is also consistent with the definition of that term under the Rehabilitation Act. While the Ninth Circuit did consider Rehabilitation Act precedents, it ultimately rejected the applicability of those precedents to the ADA because of differences in the statutory language. App. 16a-17a n.10 (citing *Mantolete v. Bolger*, 767 F.2d 1416, 1422-24 (9th Cir. 1985)). According to the Ninth Circuit Court's reasoning, because the Rehabilitation Act did not contain a definition of the term "qualified handicapped person," the EEOC regulations were controlling. *Id.* Those regulations stated that an individual who posed a direct threat to his or her own health or safety was not qualified. *Id.* The Ninth Circuit concluded that, in the ADA context, the EEOC regulations related to the term "direct threat" are

not entitled to such deference because they expand upon the statutory definition of "direct threat" in sections 12111(3) and 12113(b) of the ADA. *Id.*

The Ninth Circuit, however, appears to have disregarded the congressional directive in section 12117(b) to federal agencies processing charges of employment discrimination under the ADA and the Rehabilitation Act to ensure consistent and non-conflicting standards for the same requirements under the two Acts. 42 U.S.C. § 12117(b). Clearly, Congress sought to equate the protections of the ADA with those of the Rehabilitation Act. 42 U.S.C. § 12201; *see also* H.R. Conf. Rep. No. 101-596, at 66 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565, 575; Statement by President Bush, 26 Weekly Comp. Pres. Doc. 1165 (1990), *reprinted in* 1990 U.S.C.C.A.N. 601 ("The Administration worked closely with the Congress to ensure that, wherever possible, existing language and standards from the Rehabilitation Act were incorporated into the ADA . . . [e]mployers can turn to these interpretations for guidance on how to meet their obligations under the ADA."). Therefore, Rehabilitation Act precedents, which have routinely recognized an employer's right to consider safety in determining whether a disabled individual is qualified, are instructive to interpreting the ADA and should be considered.

Even if the Ninth Circuit's holding reflects an accurate reading of the definition of the term "direct threat," though it seems decidedly too narrow considering the ADA legislative history, the Ninth Circuit still misconstrued the scope of the defenses available to an employer under the ADA. App. 6a.

Contrary to the suggestion of the Ninth Circuit, the statutory definition of "direct threat" in no way limits the other qualification standards that may be job-related and consistent with business necessity or other defenses that may be available under the EEOC regulations. 42 U.S.C. § 12113; 29 C.F.R. § 1630.15. Indeed, the language of Section 12113(b) is permissive and inclusive, not exclusive. 42 U.S.C. § 12113(b) ("[t]he term 'qualification standards' *may include* a requirement that an individual shall not pose a direct threat . . . ") (emphasis added); *EEOC v. Exxon Corp.*, 203 F.3d 871, 873 (5th Cir. 2000). Safety, medical and other physical requirements are not "exclusively cabined into the direct threat test." *Exxon Corp.*, 203 F.3d at 873 (rejecting EEOC's position that safety-requirements could only be justified if individual posed direct threat). Rather, as other Circuit Courts have found, "[s]afety-based qualification standards are an accepted ground for a defense" under the ADA. *EEOC v. Exxon Corp.*, 203 F.3d 871, 873 (5th Cir. 2000) (safety standards may be justified as job-related and consistent with business necessity).

The Ninth Circuit, however, disagrees. By misreading section 12113(b), the Ninth Circuit has unnecessarily and arbitrarily limited the defenses available to employers under the ADA. App. 6a-7a. Under its reasoning, an employer could almost never justify safety criteria even if they were job-related and consistent with business necessity. Such a holding contradicts the express language of sections 12112(b)(6) and 12113(a) of the ADA and therefore should not be permitted to stand.

IV. AN EMPLOYMENT DECISION BASED ON AN INDIVIDUALIZED ASSESSMENT OF THE DISABLED INDIVIDUAL'S ABILITY TO PERFORM THE POSITION WITH OR WITHOUT A REASONABLE ACCOMMODATION IS PERMISSIBLE, NOT PATERNALISTIC.

Despite the conclusions of the Ninth Circuit, paternalism is not the issue here. By sticking such a label on this case, the Ninth Circuit has failed to differentiate between the blanket exclusions condemned by the ADA (and this Court in its Title VII jurisprudence) and the type of careful individualized assessment that the ADA requires and sanctions. App. 10a. According to the legislative history, the Congress intended to require covered employers to make employment decisions "based on facts applicable to the individual applicants or employees, and not on the basis of presumptions as to what a class of individuals with disabilities can or cannot do." H.R. Rep. No. 101-485(II), at 58 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 340. Similarly, an employer cannot make employment decisions based on generalized fears about the safety of the applicant or employee because "[b]y definition, such fears are based on averages and group-based predictions." *Id.* The Congress specifically sought to avoid the harmful effects of such stereotyping by requiring employers to make individualized assessments about the qualifications of a particular individual with a particular disability to perform a particular job. *Id.* at 340-41.

Chevron did not disqualify Mr. Echazabal based on stereotypical and misinformed assumptions about his qualifications for the job or concerns for his safety as an

individual with Hepatitis. App. 35a-39a. Rather, after having conducted an individualized inquiry and considering feedback from the applicant's own physician, Chevron weighed the objective medical evidence regarding Mr. Echazabal's condition in light of the demands of the job and considered the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm would occur and the imminence of the potential harm, as it was directed to do by the federal regulations and the EEOC guidance (29 C.F.R. § 1630.2(r)). App. 35a-39a. Based on that assessment, Chevron concluded that Mr. Echazabal could not perform the essential functions of the position sought without great risk to his health and safety. *Id.*

The post-offer, pre-employment medical examination conducted by Chevron operated just as Congress intended. Although medical inquiries of a disabled applicant are generally prohibited, the ADA allows employers to require medical examinations after a conditional job offer, provided that they are given to all entering employees in the same category. 42 U.S.C. § 12112(d)(3); 29 C.F.R. § 1630.14(b). According to the House Labor and Education Committee:

> This exception to the general rule [prohibiting medical inquiries] meets the employer's need to discover possible disabilities that do, in fact, limit the person's ability to do the job, i.e., those that are job-related and consistent with business necessity.

H.R. Rep. No. 101-485(II), at 73 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 355. While an abnormality in an x-ray or test result alone would not be enough to disqualify an

otherwise qualified disabled applicant, the legislative history reflects that Congress not only permitted but expected that employers would consider tangible risks to an applicant's health and safety in making employment decisions:

> **[I]f the examining physician found that there was a high probability of substantial harm if the candidate performed the particular functions of the job in question, the employer could reject the candidate,** unless the employer could make a reasonable accommodation to the candidate's condition that would avert such harm and such accommodation would not cause an undue hardship.

H.R. Rep. No. 101-485(II), at 73 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 355-356 (emphasis added).

This is precisely what Chevron did here. The physicians whom Chevron consulted found, after conducting thorough medical examinations and analyses of Mr. Echazabal's condition, that the sustained exposure to toxic chemicals required by the position that he was seeking created a "high probability of substantial harm to his health and safety because of the effects of Hepatitis C on his liver functioning." App. 35a-39a. Mr. Echazabal's personal physicians at the time agreed with these conclusions. App. 37a. Moreover, there is no question here regarding the availability of a reasonable accommodation that would have mitigated this "high probability of substantial harm," considering that "exposure to solvents and toxic chemicals were a necessary and inseparable part of the plant helper position." App. 38a-39a. Chevron, therefore, could reject Mr. Echazabal as being unqualified

for the position sought *without* committing an act of discrimination under the ADA. H.R. Rep. No. 101-485(II), at 73 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 355-356.

The individualized medical assessment that informed Chevron's decision in this case is a far cry from the broad, generalized policies that this Court has scrutinized – including the "fetal protection policy" at issue in *International Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) and the gender-based prison assignment policy at issue in *Dothard v. Rawlinson*, 433 U.S. 321 (1977). This Court concluded that those policies discriminated against women on their face. *Johnson Controls*, 499 U.S. at 198-200; *Dothard*, 433 U.S. at 332. Unlike those policies, the physical, medical and safety criteria at issue in this case are not facially discriminatory against disabled individuals. Instead, they are uniformly applied to all applicants seeking the plant helper position sought by Mr. Echazabal. Chevron's occupational safety standards disqualify only those few individuals, like Mr. Echazabal, whose particular disability makes them susceptible to serious harm or injury given the essential functions of the position that they are seeking. *See also* Chevron U.S.A., Inc.'s Writ Petition at 27-28 n.6. This uniform application of the safety criteria, coupled with statutorily permitted post-offer, pre-employment physical examination conducted by Chevron, clearly distinguishes this case from *Johnson Controls* and *Dothard*. Therefore, contrary to the Ninth Circuit's conclusions, the holdings of these Title VII cases should not be dispositive here.[4] App. 10a, 15a n.9.

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[4] In *Dothard*, this Court recognized that the application of facially neutral criteria may be prohibited where such criteria "select applicants for hire in a significantly discriminatory pattern." *Dothard*, 433 U.S. at 329 (holding that facially neutral height and weight requirement was discriminatory because it had a discriminatory impact on women and was not an accurate measure of an applicant's strength, the job-related quality that the employer had identified as being essential to working as a correctional counselor). Echazabal makes no such allegation here.

Furthermore, requiring employers to assume a risk that the disabled individual is willing to ignore does not further the purposes of the ADA. Like other federal anti-discrimination statutes, the ADA requires the employer to "measure the person for the job and not the person in the abstract." *Dothard*, 433 U.S. at 332 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971)). The objectives of the ADA would therefore be better served by ensuring that employers make employment decisions by assessing the individual's qualifications, the essential functions of the position and the objective medical evidence. *Chiari*, 920 F.2d at 317 (citing *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 284-85 (1987)). As Congress intended, these individualized assessments minimize the possibility that unfounded assumptions about the risk to a disabled individual's health or safety factor into employment decisions and operate to exclude an otherwise qualified individual from the workforce solely because he is disabled. Chevron's use of this individualized assessment and its reliance on valid and objective medical findings, findings which were supported by Echazabal's own physicians, do not violate the ADA.

The ADA, without question, seeks to make disabled individuals more autonomous. 42 U.S.C. § 12101. Personal autonomy, however, should not take precedence over personal safety. Such autonomy must yield where the individual, regardless of whether he is disabled under the ADA, seeks to accept employment despite objective medical evidence confirming that the position will jeopardize his health or safety. *Dothard*, 433 U.S. at 335 (upholding a regulation prohibiting women from serving as guards in Alabama's male maximum-security prisons because the "environment of violence and disorganization" of those institutions would place female prison guards at particular risk). This Court reached the same conclusion in *Dothard*: "More is at stake in this case, however, than an individual . . . [applicant's] decision to weigh and accept the risks of employment. . . . " *Id.* In such a case, the employer should not be forced to assume that risk simply because the individual is willing to do so.

The employer has the right, and indeed the responsibility, to adopt and apply appropriate job-related physical, medical and safety criteria to protect the health and welfare of both prospective applicants and current employees regardless of disability. What is at issue here, quite simply, is whether a disabled applicant must be afforded the unfettered opportunity to decide for himself whether he wants to accept a position that may kill him. The Ninth Circuit, through tortured statutory analysis, answers this question affirmatively. Employers Group respectfully submits that the ADA does not compel American employers to accept the terrible burden of imposing what could well be a death sentence on a prospective employee.

CONCLUSION

For the reasons stated herein, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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